Supreme Court, U.S.
FILED

No. 01 569 OCT 1 2001

OFFICE OF THE CLERK

In The

Supreme Court of the United States

KATHY LYON; AARON J. LYON; AND THE ESTATE OF DAVID LYON AND BELINDA POLLACK; HANNA MARIE POLLACK; RENEE STEVEN POLLACK; AND THE ESTATE OF STEVEN POLLACK,

Petitioners,

vs.

AGUSTA S.P.A.; AGUSTA AEROSPACE CORPORATION; SESTO CALENDE WORKS OF AGUSTA; and SIAI MARCHETTI CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

STUART B. ESNER
Counsel of Record
ESNER & CHANG
523 West Sixth Street, Suite 524
Los Angeles, California 90014
Telephone: (213) 630-1990

Attorneys for Petitioners Kathy Lyon; Aaron J. Lyon; the Estate of David Lyon; Belinda Pollack; Hanna Marie Pollack; Renee Steven Pollack; and the Estate of Steven Pollack

TIMOTHY J. WHEELER
ADAM K. SHEA
GREENE, BROILLET, TAYLOR, WHEELER & PANISH
100 Wilshire Boulevard, 21st Floor
Santa Monica, California 90401
Telephone: (310) 576-1200

Attorneys for Petitioners Kathy Lyon; Aaron J. Lyon; and the Estate of David Lyon

IAN HERZOG
WILLIAM S. VOGEL
LAW OFFICES OF IAN HERZOG
233 Wilshire Boulevard, Suite 550
Telephone: (310) 458-6660

Attorneys for Petitioners Belinda Pollack; Hanna Marie Pollack; Renee Steven Pollack; and the Estate of Steven Pollack

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

61 pp

QUESTIONS PRESENTED

On August 17, 1994, the President signed into law 49 U.S.C. section 40101 of the General Aviation Revitalization Act of 1994 ("GARA"). With limited exceptions, GARA bars actions based on defects in airplanes more than 18 years old at the time of the accident. Plaintiffs and petitioners are survivors of two of the three individuals who died in the crash of a light plane on November 26, 1993. It is undisputed that, under then existing law, petitioners had until November 25, 1994 to file suit. In reliance on this fact, petitioners' counsel proceeded to investigate the crash to identify the proper parties to sue and the proper claims to pursue. Counsel for the other survivors ("The Belzer Plaintiffs") opted to file suit earlier. The district court and the Ninth Circuit concluded that GARA applied retroactively to bar all claims within its terms that were not filed in court before that Act was signed in law. Under this interpretation the claims of petitioners, who were acting in reliance on existing law to postpone filing suit, are barred while the claims of the Belzer plaintiffs (who fortuitously filed suit before GARA was signed into law) are not barred.

The questions presented by this petition are:

1. Whether a plaintiff with an accrued cause of action who has time under the applicable statute of limitations to file suit, has a due process right to expect that a newly enacted statute will not time-bar his or her action simply because, in reliance on the existing statute of limitations, that plaintiff did not file suit before the President signed this new legislation into law?

QUESTIONS PRESENTED – continued

2. Whether Equal Protection precludes Congress from distinguishing between two sets of plaintiffs injured in the same air crash each of whom has time remaining to file suit under the existing statute of limitations, based upon the fact that one set of plaintiffs filed suit before the President signed a new statute into law and the other set, relying on the statute of limitations, did not file suit until after that point?

CORPORATE DISCLOSURE STATEMENT (RULE 29(6).)

Plaintiffs are individuals owning no controlling interest in a foreign or domestic corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT (RULE 29(6).) iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

BASIS FOR JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING CERTIORARI 5

I. THE DECISION BELOW CONTRAVENES ESTABLISHED LAW THAT DUE PROCESS PRECLUDES CONGRESS FROM RETROACTIVELY SHORTENING THE TIME TO FILE SUIT AS TO BAR EXISTING CLAIMS WITHOUT AFFORDING LITIGANTS A REASONABLE OPPORTUNITY TO FILE SUIT 7

II. THERE IS NO RATIONAL BASIS FOR DISTINGUISHING BETWEEN TWO SETS OF PLAINTIFFS INJURED IN THE SAME AIR CRASH EACH OF WHOM HAS TIME REMAINING TO FILE SUIT UNDER THE EXISTING STATUTE OF LIMITATIONS, BASED UPON THE FACT THAT ONE SET OF PLAINTIFFS FILED SUIT BEFORE THE PRESIDENT SIGNED A NEW STATUTE INTO LAW AND THE OTHER SET, RELYING ON THE STATUTE OF LIMITATIONS, DID NOT FILE SUIT UNTIL AFTER THAT POINT 11

CONCLUSION 16

TABLE OF AUTHORITIES

Page

Federal Cases

Allen v. A.H. Robins Co., Inc., 752 F.2d 1365 (9th Cir. 1985) 10

Capitan Grande Band of Mis. Indians v. Helix Irr. Dist., 514 F.2d 465 (9th Cir. 1975), *cert. denied*, 423 U.S. 874 8

Chenault v. U.S. Postal Service, 37 F.3d 535 (9th Cir. 1994) 8

Clark v. Jeter, 486 U.S. 456 (1988) 12

Colorado Republican Campaign Committee v. FEC, 518 U.S. 604 (1996) 9

Community Elec. Service v. National Elec. Contr., 869 F.2d 1235 (9th Cir. 1989) 10

Gray v. First Winthrop Corp., 989 F.2d 1564 (9th Cir. 1993) 13, 14

Henderson v. Scientific-Atlanta, Inc., 971 F.2d 1567 (11th Cir. 1992) 13, 14

In re Gault, 387 U.S. 1 (1967) 9

Kelly v. Burlington Northern R. Co., 896 F.2d 1194 (9th Cir. 1990) 8

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 ..... 13, 14

Nelson v. International Paint Co., 716 F.2d 640 (9th Cir. 1983) 9

Ockerman v. May Zima & Co., 27 F.3d 1151 (6th Cir. 1994) 8

Reed v. Reed, 404 U.S. 71 (1971) 12

TABLE OF AUTHORITIES – Continued

Page

Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) 12

Serna v. Superior Court, 40 Cal.3d 239 (Cal. 1985), *cert. denied*, 475 U.S. 1096 9

Summers v. Wallace Hospital, 276 F.2d 831 (9th Cir. 1960) 10

U.S. CONSTITUTION

5th Amendment to the U.S. Constitution 2

14th Amendment to the U.S. Constitution 2, 11

STATUTES

28 U.S.C. Section 1254(1) 1

28 U.S.C. Section 1441(d) 1

28 U.S.C. Section 2101(c) 1

49 U.S.C. Section 40101 .....2, 4

Cal. Code Civ. Proc. Section 340(3) 9

MISCELLANEOUS

McGovern, The Variety, Policy and Constitutionality of Products Liability Statutes of Repose, 30 Am.U.L.Rev. 579, 582-587 (1981) 10

Note, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 Vand. L. Rev. 627, 629 (1985) 10

51 Am. Jur. 2d *Limitation of Actions* § 38 (1970) 8

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in *Kathy Lyon et al. v. Agusta S.P.A. et al.*, 252 F.3d 1078 (9th Cir. 6/7/2001) is reported and is set forth in the Appendix hereto. App. 1, et seq.

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Ninth Circuit affirming the decision of the District Court of the Central District of California was entered on July 3, 2001, upon the denial of petitioners' petition for rehearing. App. 35. This petition for writ of certiorari is filed within ninety (90) days from that date. 28 U.S.C. Section 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1)

JURISDICTION: Federal jurisdiction of this matter is under 28 U.S.C. Section 1441(d), which provides:

> Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

49 U.S.C. Section 40101 of the General Aviation Revitalization Act of 1994 ("GARA" or "The Act") provides in pertinent part:

> (a) In General. Except as provided in subsection (b), no civil action for damages for death or injury to persons or damage to property arising out of an accident involving a general aviation aircraft may be brought against the manufacturer of the aircraft or the manufacturer of any new component system, subassembly, or other part of the aircraft, in its capacity as a manufacturer if the accident occurred – (1) after the applicable limitation period beginning on –
>
> (A) the date of delivery of the aircraft to its first purchaser or lessee, if delivered directly from the manufacturer; or
>
> (B) the date of first delivery of the aircraft to a person engaged in the business of selling or leasing such aircraft. . . .

That section proceeds to define the term "limitation period" to mean "18 years with respect to general aviation aircraft and the components, systems, subassemblies and other parts of such aircraft."

As to its effective date, the Act provides: "Except as provided in subsection (b), this Act shall take effect on the date of the enactment of this Act [Aug. 17, 1994]." Subdivision (b) provides that "[t]his Act shall not apply with respect to civil actions commenced before the date of the enactment of this Act."

STATEMENT OF THE CASE

This action arises from a tragic plane crash resulting in the death of the plane's occupants, David Lyon, Steven Pollack and Roy Belzer. Their survivors brought action

against defendants and appellees Agusta, S.P.A. and SIAI Marchetti S.P.A, the manufacturer of the accident-plane. The District Court dismissed the Lyon and Pollack actions (but not the Belzer action) exclusively under 49 U.S.C. Section 40101 of the General Aviation Revitalization Act of 1994 ("GARA"). With limited exceptions, GARA bars actions based on defects in airplanes more than 18 years old at the time of the accident. App. 15-16.

The distinguishing feature between the Lyon and Pollack actions on the one hand and the Belzer action on the other is that the Belzer plaintiffs filed suit before the President signed GARA into law whereas the Lyon and Pollack plaintiffs did not.

Defendants moved to dismiss the Lyon and Pollack plaintiffs' claims arguing that they were barred by GARA. Plaintiffs argued that GARA could not be constitutionally applied to their claims because it would effectively shorten a statute of limitations without affording a reasonable time to file suit and because it would violate equal protection. Alternatively, plaintiffs urged the district court to interpret GARA in a manner that was consistent with the Constitution.

The district court rejected plaintiffs' arguments and granted the motion to dismiss. Plaintiffs appealed.

The Ninth Circuit affirmed the judgment, ruling that GARA retroactively applied to bar this action. According to the Ninth Circuit, because GARA was a "statute of repose" and was not a "statute of limitations" GARA could constitutionally be retroactively applied to cut-off already accrued causes of action without affording a reasonable time to file suit. App. 16. The Ninth Circuit

further ruled that a rational basis existed for Congress to distinguish between plaintiffs with accrued causes of action who did not file suit before the President signed GARA into law and plaintiffs who filed suit before that point. App. 18-20. The Ninth Circuit reasoned Congress could rationally offer special protections to those who had already filed their actions. App. 19-20. Plaintiffs unsuccessfully petitioned for rehearing. This petition for certiorari follows.

REASONS FOR GRANTING CERTIORARI

This petition should be granted for two reasons. First, the Ninth Circuit's opinion is contrary to precedent that when a statute of limitations is shortened, Due Process dictates that a plaintiff be afforded a reasonable time to file suit. Here, it is beyond question that under the applicable one-year statute of limitations, plaintiffs had until and in fact filed suit before November 26, 1994.

But, on August 17, 1994, before plaintiffs filed suit, the President signed GARA into law. The effective date provision of GARA provides that the Act "shall not apply with respect to civil actions commenced before its enactment."

The Court concluded that under this provision, the very instant the President signed GARA into law, plaintiffs' already accrued causes of action were barred – even though plaintiffs had two months remaining under the statute of limitations to file suit. If plaintiffs had filed suit any time before the moment the President put pen to

paper, their action, without question, would have been timely.

Thus, under the Court's view, plaintiffs and their counsel are no longer entitled to rely upon existing statutes of limitations to determine when to file suit. After all, behind closed doors in Washington or Sacramento legislation might be in the works, which upon enactment will, with lightning speed, bar their claims.

Accordingly, plaintiffs cannot afford the "luxury" of conducting an investigation before filing suit. Once a client discusses a case with counsel, suit should be filed regardless of the time remaining on the statute of limitations. As happened here, relying on the statute of limitation to investigate the claims, might very well be fatal to the action.

The Ninth Circuit's opinion is not consistent with any notion of Due Process. Since, under the Court's view, GARA operated to cut-off an already accrued cause of action, it operated no differently then a statute of limitations – which by their nature bar accrued causes of action. Accordingly, Due Process demanded that plaintiffs be afforded a reasonable time to file suit after GARA's enactment. The Court's rejection of this argument was therefore erroneous.

At the very least, Equal Protection requires Congress to have a rational basis for treating classes of litigants differently. The stated purpose of GARA was to attempt the reversal of the declining market in the United States of small plane manufacturing by affording manufacturers knowledge that they could not be liable for the ever increasing population of aircraft over 18 years old. But

this goal is not furthered in the least by insulating manufacturers from claims simply because the lawsuit based on those claims was filed after rather than before the President signed GARA into law.

The present case is illustrative. Here, as a result of the same crash of the same airplane that gave rise to appellants' claims, the Belzer plaintiffs filed suit before the President signed GARA into law. There was not so much as a suggestion that GARA barred the Belzer claims. Yet, petitioners' claims were held to be barred because they filed suit after the President signed GARA into law – even though two months still remained under the applicable statute of limitations.

Since the purpose of GARA is linked exclusively to the *vintage of the airplane* which gives rise to the plaintiff's claims, that purpose is not furthered at all by distinguishing between classes of plaintiffs whose claims concern the identical airplane based on whether they filed suit before or after GARA's enactment. Application of GARA to bar plaintiffs' claims is therefore violative of Equal Protection.

I. THE DECISION BELOW CONTRAVENES ESTABLISHED LAW THAT DUE PROCESS PRECLUDES CONGRESS FROM RETROACTIVELY SHORTENING THE TIME TO FILE SUIT AS TO BAR EXISTING CLAIMS WITHOUT AFFORDING LITIGANTS A REASONABLE OPPORTUNITY TO FILE SUIT.

The Ninth Circuit's opinion in this case conflicts with decisions of this Court and others that

> Congress is without authority to extinguish claims by shortening the statute of limitations unless the prior limitations period has not yet expired and Congress provides a reasonable time in which the plaintiff may file suit. *See Ochoa v. Hernandez*, 230 U.S. 139, 161-162, 57 L.Ed. 1427 (1913) ('With reference to statutes of limitations, it is well settled that they may be modified by shortening the time prescribed, but only if this be done while the time is still running, and so that a reasonable time still remains for the commencement of an action before the bar takes effect.') [Citations to other Supreme Court cases.]

Ockerman v. May Zima & Co., 27 F.3d 1151, 1157 (6th Cir. 1994); *Chenault v. U.S. Postal Service*, 37 F.3d 535, 539 (9th Cir. 1994) ("A newly enacted statute that shortens the applicable statute of limitations may not be applied retroactively to bar a plaintiff's claim that might otherwise be brought under the old statutory scheme because to do so would be manifestly unjust."); *Capitan Grande Band of Mis. Indians v. Helix Irr. Dist.*, 514 F.2d 465, 468 (9th Cir. 1975) ("the Supreme Court's view [is] that the constitutionality of statutes of limitations depends upon whether 'a reasonable time is given for the commencement of an action before the bar takes effect.' [Citation.]") *cert. denied*, 423 U.S. 874; *Kelly v. Burlington Northern R. Co.*, 896 F.2d 1194, 1198-1199 (9th Cir. 1990); 51 Am. Jur. 2d *Limitation of Actions* § 38 (1970) (same).

Here, the face of the complaint shows that the plaintiffs' causes of action accrued on November 26, 1993, when the tragic plane crash occurred. App. 5. At that point and at all times until the passage of GARA into law

on August 17, 1994, it was beyond question that plaintiffs had until November 26, 1994, to file this action under California's one year statute of limitations. Cal. Code Civ. Proc. Section 340(3); *See Nelson v. International Paint Co.*, 716 F.2d 640, 644 (9th Cir. 1983).

The Ninth Circuit concluded that the retroactive application of GARA to bar the present action did not violate the constitutional proscription against shortening statutes of limitation without affording a reasonable time to file suit because GARA is a statute of repose and not a statute of limitations. App. 16. But this label based analysis is antithetical to this Court's admonition that it is the nature of the right and not the label that determines the applicability of the protections of the Bill of Rights. *See Colorado Republican Campaign Committee v. FEC*, 518 U.S. 604, 622 (1996) ("the government 'cannot foreclose the exercise of constitutional rights by mere labels"); *In re Gault*, 387 U.S. 1, 50 (1967); *Serna v. Superior Court*, 40 Cal.3d 239, 256 (Cal. 1985), *cert. denied*, 475 U.S. 1096 ("[T]he Supreme Court has emphasized that the nature of the proceeding and its consequences determine the applicability of the protections of the Bill of Rights, not 'labels of convenience.' ")

Here, we are not concerned with the constitutionality of GARA in general. Clearly, the central purpose of that Act is to serve as a statute of repose precluding causes of action from ever accruing (in contrast to a statute of limitations which precludes recovery on accrued causes

of action).[1] But, with respect to the Ninth Circuit, categorizing GARA in this manner begs the question rather than answers it. As to these plaintiffs (and as to other individuals who possessed accrued causes of action at the time GARA was signed into law) GARA operated as a statute of limitations serving to eliminate an already accrued cause of action because suit was not filed before GARA was signed into law.

There is no distinction – none whatsoever – between the manner GARA operated as to these plaintiffs and how a retroactively shortened statute of limitations operates. In both instances, the prospective plaintiffs act in reliance on existing law to determine the date by which a suit must be filed; in both instances, if the plaintiffs had filed suit before the enactment of the new law, their claims would have been preserved; in both instances a legislature changed the rules midway through the game so that their claims are no longer viable **solely because they did not file suit before a newly prescribed date**.

---

[1] While generally, "[s]tatutes of limitations limit the time in which a plaintiff may bring suit *after* the cause of action accrues, whereas statutes of repose potentially bar the plaintiff's suit *before* the cause of action accrues" (Note, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 Vand. L. Rev. 627, 629 (1985)), there is much uncertainty in the law as to the distinction, if any between the two. *See McGovern, The Variety, Policy and Constitutionality of Products Liability Statutes of Repose*, 30 Am.U.L.Rev. 579, 582-587 (1981) (Author details the various meanings ascribed to statutes of repose). Often courts use the terms interchangeably. *See Community Elec. Service v. National Elec. Contr.*, 869 F.2d 1235, 1241 (9th Cir. 1989); *Allen v. A.H. Robins Co., Inc.*, 752 F.2d 1365, 1372 (9th Cir. 1985); *Summers v. Wallace Hospital*, 276 F.2d 831, 835 (9th Cir. 1960).

As detailed, if the effective date provision of GARA were labeled as a "statute of limitations" then settled principles of law would have precluded Congress from retroactively acting in this manner. The fact that such a label was not used should not and does not dictate a different result.

Simply put, the same constitutional vice that precludes retroactively shortening a statute of limitations without affording a reasonable period to file suit likewise precludes the retroactive application of GARA to this action. This provides the first basis for certiorari.

II. THERE IS NO RATIONAL BASIS FOR DISTINGUISHING BETWEEN TWO SETS OF PLAINTIFFS INJURED IN THE SAME AIR CRASH EACH OF WHOM HAS TIME REMAINING TO FILE SUIT UNDER THE EXISTING STATUTE OF LIMITATIONS, BASED UPON THE FACT THAT ONE SET OF PLAINTIFFS FILED SUIT BEFORE THE PRESIDENT SIGNED A NEW STATUTE INTO LAW AND THE OTHER SET, RELYING ON THE STATUTE OF LIMITATIONS, DID NOT FILE SUIT UNTIL AFTER THAT POINT.

A second reason why this Court should grant certiorari is that, contrary to the Ninth Circuit's opinion, application of GARA to this action would also violate the Equal Protection clause. U.S. Const. 14th Amend. The Equal Protection clause denies "the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. *A classification 'must be reasonable, not arbitrary, and must rest upon*

some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' " Reed v. Reed, 404 U.S. 71, 75-76 (1971), quoting *Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920) (emphasis added).

Stated another way, "[a]t a minimum, a statutory classification must be rationally related to a legitimate governmental purpose" *Clark v. Jeter,* 486 U.S. 456, 461 (1988). This so-called "rational relationship" test requires the reviewing court in analyzing a statute which treats classes differently "to conduct 'a serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals' (*Dorrough v. Estelle,* (5th Cir. 1974) 497 F.2d 1007, 1011) . . . " *Newland v. Board of Governors,* 566 P.2d 254, 257 (Cal. 1977).

Equal Protection precludes Congress from distinguishing between two sets of plaintiffs injured in the same air crash each of whom have time remaining to file suit under the existing statute of limitations, based upon the fact that one set of plaintiffs filed suit before the President signed a new statute into law and the other set, relying on the statute of limitations, did not file suit until after that point. The stated purpose of GARA was to attempt the reversal of the declining market in the United States of small plane manufacturing by affording manufacturers knowledge that they could not be liable for the ever increasing population of aircraft over 18 years old. *See* Senate Report no. 103-202.

But the distinction between the categories of plaintiffs which is at issue does nothing to further that purpose and certainly does not justify the harsh result

defendants propose. *Under the distinction defendants seek to draw, two plaintiffs whose claims arise from the very same air crash could be treated markedly different even though their injuries arise from the defective nature of the same aircraft, their causes of action accrued at the same instant, and the applicable statute of limitations was scheduled to expire on the same day.* Indeed, this anomaly is present in this matter since one set of plaintiffs (the Belzers) did file their action arising from this same aircraft before GARA was signed into law. Therefore, there is no question but that the Act does *not* apply to their claims.

The arbitrary nature of defendants' position is further highlighted by the fact that under their analysis, a plaintiff injured by a fifty year old plane who commenced his or her action on August 16, 1994, would unquestionably *not* be barred by GARA while a plaintiff injured by a 19 year old aircraft who commenced his or her action a day later would not be able to do so.

Thus, the policy reasons for enacting GARA are not furthered in the least by treating plaintiffs, possessing accrued causes of actions when that Act was signed into law, so dramatically different.

Nevertheless, the Ninth Circuit concluded that Congress had a rationale basis for distinguishing between these two classes by reference to *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1573-1574 (9th Cir. 1993) (which in turn relied upon *Henderson v. Scientific-Atlanta, Inc.*, 971 F.2d 1567, 1574 (11th Cir. 1992)). App. 19. These cases considered the constitutionality of Acts of Congress which were taken in response to *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991).

In *Lampf*, this Court concluded that a uniform statute of limitations applied to actions under section 10(b) of the Securities and Exchange Act of 1934. Before *Lampf* there was a split among the circuits with several circuits borrowing the statute of limitations from state law.

The Congressional enactment in question applied to actions which were filed prior to *Lampf* and operated to render the statute of limitations in effect prior to that decision, again applicable to those actions. Among the challenges leveled by the defendants in these cases against this new statute was that it arbitrarily distinguished between those plaintiffs who filed suit before *Lampf* was decided and those plaintiffs who filed suit after that decision.

In upholding the statute against this attack, the *Gray* court and *Henderson* court each reasoned that (1) Congress could conclude that the problem created by *Lampf* was most pressing with respect to plaintiffs who had already filed suit and now found their claims time-barred and (2) Congress could solve a problem step by step rather than all at once. *Gray, supra,* 989 F.2d at p. 1573-1574; *Henderson, supra,* 971 F.2d at p. 1574.

The issue here, however, is just the reverse of the issue presented in *Gray* and *Henderson*. Unlike the Act involved in those cases, GARA was not enacted to eliminate unfairness caused by the retroactive application of a newly announced rule. Rather, GARA itself announced the new rule and then proceeded to delineate that it applied to some claims but not others depending on whether a lawsuit was filed. Thus, under GARA Congress was not endeavoring to correct a perceived problem, in

which case it could do so one step at a time. Rather, it was creating the problem to begin with.

As applied in this case, two plaintiffs whose claims arise from the very same air crash could be treated markedly different even though their injuries arise from the defective nature of the same aircraft, their causes of action accrued at the same instant, and the applicable statute of limitations was scheduled to expire on the same day.

The fact that under these circumstances, one plaintiff has taken the additional step of filing suit while another plaintiff holding an equally valuable claim, has decided to conduct additional investigation before filing suit knowing that time remained under the existing statute of limitations, does not serve as a rational reason to conclude that it is more fair to bar the claims of the plaintiff who has not yet filed suit.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

DATED: September 27, 2001

Respectfully submitted,

STUART B. ESNER
Counsel of Record
ESNER & CHANG
523 West Sixth Street, Suite 524
Los Angeles, California 90014
Telephone: (213) 630-1990

Attorneys for Petitioners Kathy Lyon; Aaron J. Lyon; the Estate of David Lyon; Belinda Pollack; Hanna Marie Pollack; Renee Steven Pollack; and the Estate of Steven Pollack

TIMOTHY J. WHEELER
ADAM K. SHEA
GREENE, BROILLET, TAYLOR, WHEELER & PANISH
100 Wilshire Boulevard, 21st Floor
Santa Monica, California 90401
Telephone: (310) 576-1200

Attorneys for Petitioners Kathy Lyon; Aaron J. Lyon; and the Estate of David Lyon

IAN HERZOG
WILLIAM S. VOGEL
LAW OFFICES OF IAN HERZOG
233 Wilshire Boulevard, Suite 550
Telephone: (310) 458-6660

Attorneys for Petitioners Belinda Pollack; Hanna Marie Pollack; Renee Steven Pollack; and the Estate of Steven Pollack

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KATHY LYON, an individual and as Guardian Ad Litem for AARON J. LYON; & TARA JEAN LYON; AARON J. LYON, by and through his Guardian Ad Litem Kathy Lyon; TARA JEAN LYON, by and through her Guardian Ad Litem Kathy Lyon; DAVID LYON, by and through its [sic] Personal Representative Kathy Lyon, *Plaintiff-counter-defendant-cross-defendants-Appellants,* v. AGUSTA S.P.A.; SIAI MARCHETTI CORPORATION; SESTO CALENDE WORKS OF AGUSTA; AGUSTA AEROSPACE CORPORATION, *Defendant-counter-claim-3rd-party-plaintiffs-Appellees,* and UNITED STATES OF AMERICA, *Intervenor.*	No. 99-55986 D.C. No. CV-94-07769-CBM

KATHY LYON, an individual and as Guardian Ad Litem for AARON JEAN LYON; & TARA JEAN LYON AARON J. LYON, by and through his Guardian Ad Litem Kathy Lyon; TARA JEAN LYON, by and through her Guardian Ad Litem Kathy Lyon; DAVID LYON, by and through its [sic] Personal Representative Kathy Lyon,

Plaintiff-counter-defendant-cross-defendants-Appellants-cross-Appellees,

v.

AGUSTA S.P.A.; SIAI MARCHETTI CORPORATION; AGUSTA AEROSPACE CORPORATION; SESTO CALENDE WORKS OF AGUSTA,

Defendant-counter-claim-3rd-party-plaintiffs-Appellees-cross-Appellants,

and

UNITED STATES OF AMERICA,

Intervenor.

No. 99-55987

D.C. No. CV-94-07769-CBM

BELINDA POLLACK, individually; HANNA MARIE POLLACK, by and through her Guardian Ad Litem, Belinda Pollack; RENEE STEVEN POLLACK, by and through her Guardian Ad Litem, Belinda Pollack; ESTATE OF STEVEN S. POLLACK, by and through its Personal Representative, Belinda Pollack, *Plaintiffs-Appellants,* v. AGUSTA, S.P.A.; SIAI MARCHETTI CORPORATION, *Defendants-Appellees,* and UNITED STATES OF AMERICA, *Intervenor.*	No. 99-56010 D.C. No. CV-94-07770-CBM

BELINDA POLLACK, individually; HANNA MARIE POLLACK, by and through her Guardian Ad Litem, Belinda Pollack; RENEE STEVEN POLLACK, by and through her Guardian Ad Litem, Belinda Pollack; ESTATE OF STEVEN S. POLLACK, by and through its Personal Representative, Belinda Pollack, *Plaintiffs-Appellants-Cross-Appellees,* v. AGUSTA, S.P.A.; SIAI MARCHETTI CORPORATION, *Defendants-Appellees-Cross-Appellants.*	No. 99-56011 D.C. No. CV-94-07770-CBM OPINION

Appeal from the United States District Court
for the Central District of California
Consuelo B. Marshall, District Judge, Presiding

Argued and Submitted
April 17, 2001 – Pasadena, California

Filed June 7, 2001

Before: Harry Pregerson, Ferdinand F. Fernandez, and Susan P. Graber, Circuit Judges.

Opinion by Judge Fernandez

David Lyon, Steven Pollack and Roy Belzer were killed in the crash of an airplane. Kathy Lyon, et al., and Belinda Pollack, et al., survivors of David Lyon and

Steven Pollack, respectively, (collectively Survivors) brought this action against Agusta S.P. A., Agusta Aerospace Corporation, Sesto Calende Works of Agusta, and Siai Marchetti Corporation. The Agusta entities are owners of Marchetti, which designed and manufactured the aircraft. Those entities and Marchetti are instrumentalities of the Republic of Italy.[1] Marchetti moved to dismiss the action on the basis that under the Foreign Sovereign Immunities Act of 1976 (the FSIA), the district court did not have jurisdiction over it. *See* 28 U.S.C. § 1604. It also moved to dismiss on the basis that the action was barred by the provisions of the General Aviation Revitalization Act of 1994 (GARA). *See* Pub. L. No. 103-298, 108 Stat. 1552 (1994) (provisions at 49 U.S.C. § 40101 notes). The district court denied the former motion and granted the latter. The Survivors and Marchetti appeal. We affirm.

BACKGROUND

On November 26, 1993, an airplane designed and manufactured by Marchetti and known as model F-260 crashed in Santa Monica, California. David Lyon and Steven Pollack were aboard, and both were killed in the accident. The airplane had originally been sold by Marchetti in December of 1970 to SA Sabena N.V. in Belgium and had, after intervening transfers, become the property of the owner of the craft at the time of the crash. The Survivors brought their action on November 15,

---

[1] Hereafter, for convenience, we will refer to all the entities collectively as Marchetti.

1994, but the effective date of GARA was August 17, 1994, and that Act declares that, absent certain defined exceptions, "no civil action . . . may be brought against the manufacturer . . . if the accident occurred" more than 18 years after the aircraft was delivered to the first purchaser or to a person in the business of selling aircraft. GARA §§ 2(a), 3(3). The Survivors asserted that the Act did not apply to them. They also asserted that Marchetti had failed to issue later warnings about an alleged problem with the aircraft, and that amounted to replacement of a component part, which would have started a new 18-year period running from the time of that failure. The district court held that GARA barred the actions.

STANDARDS OF REVIEW

We review de novo a district court's dismissal of a complaint for failure to state a claim. *Johnson v. Knowles*, 113 F.3d 1114, 1117 (9th Cir. 1997). "A complaint should not be dismissed unless it appears beyond doubt that the Plaintiffs can prove no set of facts in support of their claim that would entitle them to relief." *Id.* We also review de novo the issue of whether a statute applies retrospectively. *United States ex rel. Lindenthal v. Gen. Dynamics Corp.*, 61 F.3d 1402, 1406-07 (9th Cir. 1995). In addition, the existence of subject matter jurisdiction under the FSIA is a question of law, which we review de novo. *Phaneuf v. Republic of Indonesia*, 106 F.3d 302, 304-05 (9th Cir. 1997). Finally, we review the district court's denial of a Federal Rule of Civil Procedure 60(b) motion for an abuse of discretion. *Civic Ctr. Square, Inc. v. Ford (In re Roxford Foods, Inc.)*, 12 F.3d 875, 879 (9th Cir. 1993).

JURISDICTION

Before proceeding any further, we must determine whether we have jurisdiction over this action in light of the fact that Marchetti is an instrumentality of the Republic of Italy.[2] There can be no dispute about the general rule that "a foreign state shall be immune from the jurisdiction of the courts of the United States." 28 U.S.C. § 1604. Of course, there are exceptions to that, *id.*, and one of them is that there shall not be immunity in a case "in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2).

The parties do agree that Marchetti's acts of designing, manufacturing and selling the F-260 were "in connection with a commercial activity" and that the activity was "outside the territory of the United States." What is in dispute is whether that activity caused "a direct effect in the United States," and it is that rather enigmatic proposition that we must construe. The Supreme Court has unraveled the enigma to some extent.

In *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 112 S. Ct. 2160, 119 L. Ed. 2d 394 (1992), the Court was faced with a situation where Argentina had issued certain bonds payable in United States dollars, with payment, at the election of the creditor, to be made on the New York market. *Id.* at 609-10, 112 S. Ct. at 2163-64. When the

---

[2] There is no dispute that Marchetti is an instrumentality. As such, it is a foreign state. *See* 28 U.S.C. § 1603(a) & (b).

bonds matured, Argentina did not pay them, and an action was commenced against it in the United States District Court for the Southern District of New York. Pursuant to the FSIA, Argentina moved to dismiss for lack of jurisdiction, but that motion was denied. *Id.* at 610, 112 S. Ct. at 2164. The Court began by rejecting the notion that in order for an effect to be direct, it must be substantial or foreseeable. *Id.* at 618, 112 S. Ct. at 2168. Rather, said the Court, "an effect is 'direct' if it follows 'as an immediate consequence of the defendant's . . . activity.' " *Id.* (citation omitted). The Court, thus, explicated the text with an oracular pronouncement of its own. It had little trouble in applying that to the case before it, where Argentina had actually contracted to make payments in the United States. *Id.* at 618-19, 112 S. Ct. at 2168-69. Its application here is not quite as obvious.

Because of that, Marchetti seizes on a case in which a district court held that the FSIA exception did not apply to the crash of a helicopter in Colorado. *Four Corners Helicopters, Inc. v. Turbomeca S. A.*, 677 F. Supp. 1096, 1097 (D. Colo. 1988). That craft was manufactured, at least in part, by an instrumentality of France and was sold in that country. *Id.* at 1098. The helicopter finally found its way into the United States many years later. The court, which did not have the benefit of *Weltover*, ruled that in order to have a direct effect here "the injury suffered by the plaintiff must be 'a substantial, foreseeable and immediate causal result of an act of the defendant outside the United States in connection with [defendant's] commercial activity elsewhere.' " *Id.* at 1101 (citation omitted). But that is exactly what the Supreme Court said the effect need not

be. Again, it need only be an "immediate consequence" of the defendant's activity. Thus, Marchetti's reliance on Four Corners is misplaced. *See Adler v. Fed. Republic of Nigeria*, 219 F.3d 869, 876 (9th Cir. 2000); *see also Corzo v. Banco Cent. de Reserva del Peru*, 243 F.3d 519, 525-26 (9th Cir. 2001).

Once we eschew both substantiality and foreseeability, we must interpret "immediate consequence" to mean something different from those terms. Particularly where failure of a manufactured product is concerned, a more appropriate reading of the phrase should focus on whether some intervening act broke the chain of causation leading from the asserted wrongful act to its impact in the United States.[3] That view is propounded in *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534 (11th Cir. 1993), which is more apposite to the case at hand than the arguments pressed upon us by Marchetti. Vermeulen was driving a Renault in Georgia when she was injured in an accident. The car was designed and manufactured by a corporation which was wholly owned by the French government. *Id.* at 1537. The court applied the *Weltover* test and held: "The complaint in this case alleges that the injuries Vermeulen suffered in an automobile accident on the roads of Georgia were the result of RNUR's negligent design and manufacture of the LeCar passenger restraint

---

[3] Marchetti suggests that "immediate" refers to time, and a delay of some 23 years cannot be immediate. We disagree. While one meaning of immediate is "occurring, acting, or accomplished without loss of time," the more relevant meaning in this context is "acting or being without the intervention of another object, cause, or agency." Webster's Third New International Dictionary 1129 (1986).

system. We can hardly imagine a more immediate consequence of the defendant's activity." *Id.* at 1545.

It should be noted, however, that there can be little doubt that the sale and use of the automobile in question in the United States was contemplated by the manufacturer. *Id.* at 1537-42. Nevertheless, that fact relates to foreseeability more than it relates to "immediate consequence," and in *Vermeulen* the court properly focused on the latter. A defective product failed because of the defect; the consequence could hardly be more immediate. The same is allegedly true in the case at hand.

Marchetti asks us to consider, instead, the gloss placed on the concept in *Princz v. F.R.G.*, 307 U.S. App. D.C. 102, 26 F.3d 1166 (D. C. Cir. 1994). That was an attempt by a Holocaust survivor to sue the Federal Republic of Germany for injuries he suffered in Europe. 26 F.3d at 1168. The court declared that there was no direct effect in the United States and opined that "[a] 'direct effect' however, 'is one which has no intervening element, but, rather, flows in a straight line without deviation or interruption.' " *Id.* at 1172 (citation omitted). In so doing, the court quoted one of its own pre-*Weltover* cases. Even if we apply that gloss, it is pellucid that the line between the defective production of the aircraft and the failure of that product because of the defect was a straight one. The acts which resulted in production of an allegedly defective product were legally significant and gave rise to the claim at hand. *See Adler*, 219 F.3d at 876.

Therefore, we hold that we do have jurisdiction. In so stating, we recognize that much time passed between the manufacture and the injury and that the aircraft even

changed hands. Still, time itself is linear, and while questions about its ravages, or speculation about the ravages of others along the way, may affect proof, they do not affect jurisdiction. Nevertheless, considerations of that sort do lead legislatures to enact statutes of repose. With that in mind, we turn to GARA.

DISCUSSION

It is apparent that Congress was deeply concerned about the enormous product liability costs that our tort system had imposed upon manufacturers of general aviation aircraft. It believed that manufacturers were being driven to the wall because, among other things, of the long tail of liability attached to those aircraft, which could be used for decades after they were first manufactured and sold. *See* H.R. Rep. No. 103-525, pt. I, at 1-4 (1994), reprinted in 1994 U.S.C.C.A.N. 1638, 1638-41. Congress therefore enacted GARA, which provides that:

> Except as provided in subsection (b), no civil action for damages for death or injury to persons or damage to property arising out of an accident involving a general aviation aircraft may be brought against the manufacturer of the aircraft or the manufacturer of any new component, system, subassembly, or other part of the aircraft, in its capacity as a manufacturer if the accident occurred –
>
> (1) after the applicable limitation period [18 years] beginning on –

> (A) the date of delivery of the aircraft to its first purchaser or lessee, if delivered directly from the manufacturer; or
>
> (B) the date of first delivery of the aircraft to a person engaged in the business of selling or leasing such aircraft. . . .

GARA § 2(a)(1). That is a classic statute of repose. *See Caldwell v. Enstrom Helicopter Corp.*, 230 F.3d 1155, 1156 (9th Cir. 2000). It does not run from the date on which an injury occurs. There will be a statute of limitations which runs from that date. Rather, it runs from what amounts to the date of the first transfer from the manufacturer. Thus, if an accident occurs one day before the GARA period runs, an action will be possible and will be governed by the usual statute of limitations. If it occurs on the day after the GARA period runs, no action whatsoever is possible.

The Survivors argue, however, that GARA is not retroactive; that is, it does not properly cover their action because the accident in question occurred before GARA was enacted. They add that if GARA does cover them, it is unconstitutional. We disagree with those propositions. In the remainder of this opinion, we will deal with those questions, and other related issues.

A. Retroactivity

No doubt there can be serious philosophical debates over whether retroactive legislation can be called law at all, if the purpose of law is to bring good order to society by guiding our activities and channeling them along

desirable lines.[4] But, the Supreme Court has made it clear that, with some noteable exceptions, retroactive legislation is permissible. With that in mind, it has outlined the proper approach to reading statutes. All things remaining equal, we presume that statutes are not meant to be retroactive. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 265-67, 114 S. Ct. 1483, 1497-98, 128 L. Ed. 2d 229 (1994). Presumptions aside, we must give a statute "its intended scope." *Id.* at 267, 114 S. Ct. at 1498. We must first "determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules." *Id.* at 280, 114 S. Ct. at 1505. If Congress has not done so, we must go on to ask "whether the new statute would have retroactive effect." *Id.* In so doing, we ask "whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* If it does have that effect, we apply the traditional presumption, "that it does not govern absent clear congressional intent favoring such a result." *Id.* Still, we must try to avoid sweeping away "settled expectations" unnecessarily. *See id.* at 266, 114 S. Ct. at 1497.

We bring all of this to the provisions of GARA wherein Congress has declared that the "Act shall take effect on the date of" its enactment, August 17, 1994. GARA § 4(a). There is nothing extraordinary about that wording as such; it certainly does not speak to retroactivity. *See Landgraf*, 511 U.S. at 257, 114 S. Ct. at 1493. But

---

[4] *See* Lon Fuller, The Morality of Law 39, 44 (1964).

preceding that declaration is the phrase "except as provided in subsection (b)," and that subsection reads, "this Act shall not apply with respect to civil actions commenced before the date of the enactment of this Act." GARA § 4(b). That language may not expressly state the reach of the statute, although a moment of reflection suggests that it must have been intended to cut off claims that were not already part of a commenced civil action. Surely it expresses a clear intent that other claims be barred. Congress could easily have said that the statute did not apply to any "accidents that occurred" before the effective date of the Act; it had used just that form of locution in § 2(a) when it defined the scope of the Act itself. Instead, just a couple of relatively short sections later it used the language found in § 4(b) and indicated a desire to preserve pending actions only. We think that, "nothing, indeed, but a different intent explains the different treatment." *Lindh v. Murphy*, 521 U.S. 320, 329, 117 S. Ct. 2059, 2064, 138 L. Ed. 2d 481 (1997).

It is not unusual for Congress to draw just that distinction between claims which are already part of a commenced civil action and those which are possible, but have not been filed yet. *See Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1567, 1572 (9th Cir. 1993). We, therefore, are satisfied that Congress clearly expressed its intention that GARA be applied to all actions that had not already been commenced on its effective date.

But, say the Survivors, perhaps a civil action is commenced when an accident has occurred because that puts in train a series of events that could lead to an actual filing. However, normal use of legal language would not dub that "commencement of an action." *See*, e. g., Fed. R.

Civ. P. 3 ("A civil action is commenced by filing a complaint with the court."); *Altseimer v. Bell Helicopter Textron Inc.*, 919 F. Supp. 340, 342 (E. D. Cal. 1996) (same). Also, say the Survivors, we should interpret GARA to provide that if any person has filed a civil action arising out of the same accident, everybody involved in the accident should be deemed to have commenced one. Again, we are aware of no authority for that interesting proposition, and we decline to create that rule out of whole cloth. The mischief it could cause is palpably obvious. Certainly, the fact that somebody has already started an action gives notice of that person's claim; it also tends to show that there was no artificial barrier to commencement of an action. At any rate, there is no reason to create a rule that one party's filing of an action commences the action of an entirely separate party.

B. Constitutionality

The Survivors next argue that if GARA bars their action, it is unconstitutional both substantively and procedurally. Their substantive argument rests on the theory that they have been deprived of a vested property right in their cause of action. That argument cannot succeed. We have squarely held that although a cause of action is a "species of property, a party's property right in any cause of action does not vest until a final unreviewable judgment is obtained." *Grimesy v. Huff*, 876 F.2d 738, 743-44 (9th Cir. 1989) (citations and internal quotation marks omitted); *see also Austin v. City of Bisbee*, 855 F.2d 1429, 1435-36 (9th Cir. 1988).

The Survivors also claim that the statute violates a procedural due process right because a statute of limitations cannot be shortened in a way that eliminates the plaintiff's ability to file an action. *See Chenault v. United States Postal Serv.*, 37 F.3d 535, 539 (9th Cir. 1994); *Ockerman v. May Zima & Co.*, 27 F.3d 1151, 1157 (6th Cir. 1994); *Capitan Grande Band of Mission Indians v. Helix Irrigation Dist.*, 514 F.2d 465, 468 (9th Cir. 1975). But GARA is not a statute of limitations, and does not shorten any statute of limitations. It is, again, a statute of repose. *See Caldwell*, 230 F.3d at 1156. The focus of a statute of repose is entirely different from the focus of a statute of limitations. The latter bars a plaintiff from proceeding because he has slept on his rights, or otherwise been inattentive. Therefore, it is manifestly unjust to tell somebody that he has X years to file an action, and then shorten the time in midstream. However, a statute of repose proceeds on the basis that it is unfair to make somebody defend an action long after something was done or some product was sold. It declares that nobody should be liable at all after a certain amount of time has passed, and that it is unjust to allow an action to proceed after that. In this case, for example, there was an attempt to sue the manufacturer for the allegedly defective design of a part of an aircraft that had been in service for some 23 years after it was first sold. While an injured party might feel aggrieved by the fact that no action can be brought, repose is a choice that the legislature is free to make. *See* generally *Stuart v. Am. Cyanamid Co.*, 158 F.3d 622, 627 (2d Cir. 1998); *Amoco Prod. Co. v. Newton Sheep Co.*, 85 F.3d 1464, 1472 (10th Cir. 1996); *Sch. Dist. No. 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1259 (9th Cir. 1993).

Therefore, when we focus, as Congress did, on the need to revitalize a flagging industry, it is difficult to see any real unfairness in the decision to cut the infinite-liability tail, even though a cause of action might have accrued before selection of the length of the period of repose was made. The holder of an existing cause of action was no more, or less, worthy than a person who would come later, and had no less of an opportunity to seek a recovery. In neither case are the jeremiads of the injured party less appealing. The legislative decision was not made on the basis of the injured party's alacrity or merit; it was made on the basis that in the course of human affairs too much time had elapsed since the date of a defendant's acts.

Of course, the legislature must act in a rational manner; that almost goes without saying. But barring irrational or arbitrary conduct, Congress can adjust the incidents of our economic lives as it sees fit. *See Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729, 104 S. Ct. 2709, 2717, 81 L. Ed. 2d 601 (1984); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S. Ct. 2882, 2892-93, 49 L. Ed. 2d 752 (1976). Indeed, the Supreme Court has not blanched when settled economic expectations were upset, as long as the legislature was pursuing a rational policy. *See R.A. Gray & Co.*, 467 U.S. at 729, 104 S. Ct. at 2717; *Turner Elkhorn Mining Co.*, 428 U.S. at 15, 96 S. Ct. at 2892-93. Here the choice was assuredly rational. In so stating, we do not overlook the Survivors' request that we consider *Shadburne-Vinton v. Dalkon Shield Claimants Trust*, 60 F.3d 1071, 1074 (4th Cir. 1995), where the court opined that "in analyzing the constitutionality of retroactive legislation, statutes of repose are now treated

the same as statutes of limitation." Of course, they are treated the same in the sense that both are subject to rational basis review.

But that does not mean that what is rational for one is precisely the same as what is rational for the other. We can, for example, test the rationality of both dogs and cats, but we test each according to the characteristics of its species. Similarly, in this instance the different characteristics of the different species of statutes – repose versus limitations – affect considerations about their rationality. The Fourth Circuit recognized as much when it went on to explain that the issue actually was whether the statute in question served "a legitimate legislative purpose that is furthered by rational means." *Id.* at 1075-76. It then upheld an enlargement of a statute of repose because that simply readjusted the benefits and burdens of economic life. *Id.* at 1077. That surely does not affect our decision here, except as it supports it. This statute, too, simply reallocated those benefits and burdens.

In truth, what seems to gall the Survivors most is that other victims of the accident in question here had already filed their actions, and Congress did ameliorate the harshness of GARA to some extent when it determined that those who already had actions on file would not be barred from proceeding. But that glissades to their claim that their equal protection rights have been violated.

The glissando, however, does not advance their cause, for it is stymied by precedent. In 1991, the Supreme Court authoritatively resolved uncertainty regarding the proper statute of limitations in securities

cases. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 111 S. Ct. 2773, 115 L. Ed. 2d 321 (1991). It decided upon a period of one year. *Id.* at 364, 111 S. Ct. at 2782. That decision took many people by surprise because in places like the Ninth Circuit a longer statute had been in use. Congress decided to ameliorate the plight of people caught unawares, but in doing so it limited relief to those who had already commenced an action on the day that the Supreme Court ruled. *See* 15 U.S.C. § 78aa-1. That was attacked as a violation of the equal protection principles buried in the due process clause of the Fifth Amendment.[5] We declared that Congress could limit its special concerns to those who "had legitimately and indisputably relied on the state of the law prior to Lampf." *Gray*, 989 F.2d at 1573-74. We saw nothing irrational about that choice and determined, instead, that it passed "constitutional muster, amply surviving rational basis scrutiny." *Id.* at 1574. In so doing, we quoted the Eleventh Circuit's statement that:

> It is not irrational for Congress to limit its remedy to those individuals who have gone so far as to file suit in reliance upon the existing statute of limitations. These individuals will suffer the most concrete injury because they have expended significant time and effort to bring

---

[5] The Supreme Court has, of course, determined that the equal protection clause of the Fourteenth Amendment is, essentially, surplusage because its principles are contained and embedded in the concept of due process and, therefore, can be found within the Fifth Amendment although it does not mention equal protection at all. *See Vance v. Bradley*, 440 U.S. 93, 94 n. 1, 99 S. Ct. 939, 941 n. 1, 59 L. Ed. 2d 171 (1979); *Bolling v. Sharpe*, 347 U.S. 497, 500, 74 S. Ct. 693, 695, 98 L. Ed. 884 (1954).

> their action, not to mention substantial funds for attorney's fees and court costs.

Id. (citation omitted). So it is here. Congress rationally can, and did, offer special protection to those who had already filed their actions. That was not irrational. GARA is constitutional in this respect.

C. Subsidiary Arguments

In an attempt to save the day, the Survivors make two subsidiary arguments. First, they assert that a new 18-year period started against Marchetti under the "component part" portion of the Act. *See* GARA § 2(a)(2). Second, they assert that they should have been permitted to amend to spell out a claim under the exception regarding misrepresentations to the Federal Aviation Administration. *See* GARA § 2(b)(1). We reject both of those claims.

(1) Component parts

No doubt, addition of a new component part can start a new 18-year period of repose running from the date of completion of the addition of that part to the aircraft. GARA § 2(a)(2). Moreover, we have held that a part need not be hardware; it might actually be something like a "revised aircraft manual." *Caldwell*, 230 F.3d at 1158. The Survivors attempt to argue that a failure to warn about a newly perceived problem also amounts to something like replacement of a component part because it breaches an alleged continuing duty to upgrade and update. We do not agree. Were that so, GARA would have little value to manufacturers because the plaintiff could

always argue that an 18-year period commenced if the manufacturer did nothing at all, while simultaneously arguing that if the manufacturer did do something that, too, would start a new 18-year period running. That is not the law, and in *Caldwell* we alluded to the fact that a revision to a manual was quite different from a failure to warn. *Id.* at 1157. What we alluded to there, we reify here: a failure to warn is decidedly not the same as replacing a component part with a new one. It does not allow the Survivors to bypass the GARA bar.

(2) Motion to vacate

Finally, the Survivors assert that the district court abused its discretion when it denied their motion under Federal Rule of Civil Procedure 60(b)(6) to vacate its prior judgment so that they could amend their complaint to assert the exception involving knowing misrepresentations to the FAA. GARA § 2(b)(1). Rule 60(b)(6) does allow the district court to vacate its judgment based on "any other reason justifying relief from the operation of the judgment." The Survivors assert that their reason is that they have a fait nouveau. They say that they have now learned that fraud on the FAA was committed by Marchetti. The fatal flaw in their argument centers on the phrase "any other reason." The reason they state is not another reason at all; it is, in fact, already contained in Rule 60(b)(2) (newly discovered evidence) or, perhaps, in Rule 60(b)(3) (fraud). But motions under those provisions must be brought within one year of the judgment which is being attacked. *See* Fed. R. Civ. P. 60(b). The judgments in question here were entered in May of 1996, and the

motions were brought in April of 1998. Thus, the motions were not brought within one year.

The Survivors cannot avoid the time bar by pointing out that their motion was made under Rule 60(b)(6). That portion of the rule is not a substitute for the preceding portions. *See United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049-50 (9th Cir. 1993). The long-standing rule in this circuit is that, "clause (6) and the preceding clauses are mutually exclusive; a motion brought under clause (6) must be for some reason other than the five reasons preceding it under the rule." *Molloy v. Wilson*, 878 F.2d 313, 316 (9th Cir. 1989); *see also Lafarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1338 (9th Cir. 1986). That must be so, if the one year limitation is not to be repealed by judicial fiat. The district court did not abuse its discretion.

CONCLUSION

Congress decided that the economic health of the general aviation aircraft manufacturing industry depended on lifting the requirement that manufacturers abide the possibility of litigation for the indefinite future when they sell an airplane. It, therefore, generally limited their exposure to accidents which occur within 18 years of the first delivery of the airplane. GARA §§ 2(a), 3. Marchetti first delivered the F-260 in question here about 23 years before the crash in California. We hold that in GARA Congress constitutionally barred an action based upon that accident, even though GARA itself was not passed until after the accident occurred. We also hold that, while Marchetti would rather escape liability here

on the jurisdictional grounds provided by the FSIA, it cannot do so, but must be content to rely on GARA faute de mieux.

AFFIRMED. The parties shall bear their own costs on appeal.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Belinda Pollack, et al., Plaintiffs, v. Agusta S.P.A., et al., Defendants.	CV 94-7769 CBM Order Re: Defendants' Motion to Dismiss
Kathy Lyon, et al., Plaintiffs, v. Agusta S.P.A., et al. Defendants.	CV 94-7770 CBM Defendants' Motion to Dismiss (FILED DEC 1 1995)

This matter is before the Court on Defendants' Motion to Dismiss. The parties appeared before the Court, the Honorable Consuelo B. Marshall, United States District Judge, presiding, on October 30, 1995. Having reviewed all of the papers, evidence and arguments, the Court hereby GRANTS Defendants' Motion to Dismiss without prejudice.

Before the Court are several cases arising out of a plane accident which occurred on November 26, 1993. The plane crashed into an apartment building in Santa Monica, California. The plane's occupants, Roy Belzer ("Belzer"), David Lyon ("Lyon") and Steven Pollack ("Pollacek"), died in the crash. Three residents of the apartment building, Carl Ralph ("Ralph"), Steve Reed

("Reed") and Joanna Pittard ("Pittard"), claim to have been injured. All of the Plaintiffs in this case have filed suit against Agusta S.p.A, Agusta Aerospace Corporation, and Sesto Calende Worlds of Agusta (collectively "Agusta"), and Siai Marchetti Corporation ("Marchetti").

Agusta and Marchetti are instrumentalities of the Republic of Italy. Marchetti is the designer and manufacturer of the aircraft engine, including various other parts and components, of the plane that crashed. Agusta is the owner, along with another government entity, of Marchetti.

In December 1970, Marchetti sold and delivered the plane to its original purchaser, Sabena, in Belgium. After that time, Marchetti claims that it had no involvement with that aircraft.

A. Applicability of the General Aviation Revitalization Act ("GARA") of 1994

The GARA represents a legislative decision to decrease the number of potential suits arising from airplane manufacturing. To effectuate this purpose, the GARA includes provisions specifying which parties may be held liable and when such actions must be brought.[1]

---

[1] Section 2 of the GARA states:

(a) Except as provided in subsection (b), a civil action for damages for death or injury to persons or damage to property arising out of an accident involving a general aviation aircraft may be brought against the manufacturuer [sic] of the aircraft or the manufacturuer [sic] of any new component, system,

Specifically, the GARA includes a " 'limitation period' . . . of 18 years with respect to general avaiation aircraft and the components, systems, subassemblies, and other parts of such aircraft . . . " General Aviation Revitalization Act of 1994, § 3(3). Pursuant to § 4 of the GARA, the Act takes effect as of August 17, 1994, but does not apply to actions commenced before this date. The actions by the Lyon and Pollack Plaintiffs were originally filed on November 15, 1994. Plaintiffs have not cited any authority to support their position that this Court should judicially legislate a grace-period for filing suits based on accidents which occurred before GARA was passed. Accordingly, this Court concludes that Plaintiffs' action is subject to GARA.

Furthermore, the Court concludes that GARA is not unconstitutional either on its face or as applied to Plaintiffs' case. The GARA, as economic legislation, "comes to the Court with a presumption of constitutionality, and . . . the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 83 (1977) (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)). Plaintiffs have failed to offer any

---

subassembly, or other part of the aircraft, in its capacity as a manufacturer if the accident occurred –

(1) after the applicable limiation period beginning on –

(A) the date of delivery of the aircraft to its first purchaser, if delivered directly from the manufacturer . . .

authority to support their contention that the Constitution requires an extension of the time to file suit when a statute of repose is passed.

Additionally, this Court concludes that Plaintiffs have not been deprived of a property right (in a civil action) in violation of due process through the application of the GARA to this case. Although the application of the GARA may bar this civil action, property rights in a civil action do not vest until entry of final judgment. *Grimsey v. Huff*, 876 F.2d 738, 743-44 (9th Cir. 1989). Consequently, Plaintiffs do not have any property rights in the case at bar.

In order to bypass GARA's limitation period, Plaintiffs alternatively urge the Court to adopt various interpretions of the phrase "civil actions commenced" in GARA, Section 4. However, these interpretations conflict with the provisions of the Federal Rules of Civil Procedure which clearly define this language. *See* Fed. R. Civ. P. 2-3. Therefore, this Court declines to adopt any of the definitions urged by Plaintiffs.

Plaintiffs also contend that component parts manufactured by Defendants may have been installed into the plane within the 18 year statutory period prescribed by GARA. In particular, they claim that the engine was replaced during the statutory period and that engine mounts produced by the Defendants were likely installed during that process. Since such allegations are not included in the complaint, however, they cannot be considered for purposes of the present motion.

II. Foreign Sovereign Immunities Act ("FSIA")

Defendants contend this Court does not have subject-matter jurisdiction because Defendants are instrumentalities of foreign countries and immune from suit under the FSIA. However, Defendants fall within an exception to the FSIA which states: "A foreign state shall not be immune from suit . . . in any case . . . (2) in which the action is based upon . . . an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605. Plaintiffs allege that Defendants negligently manufactured and installed the aircraft parts that caused the accident in question. Assuming the truth of these allegations, the Court concludes that Defendants' activities had a "direct effect" in the United States.

In opposition to this conclusion, Defendants rely heavily upon *Four Corners Helicopters, Inc. v. Turbomeca S.A.*, 677 F.Supp. 1096 (D.Colo. 1988). However, subsequent to *Four Corners*, the Supreme Court has explained that the question of whether a foreign sovereign's commerical activity has a "direct effect" in the United States does not contain any unexpressed requirement of "substantiality" or "foreseeability"; an effect is "direct" if it follows as an immediate consequence of the defendant's activity. *Republic of Argentina v. Weltover, Inc.*, 505 U.S. 607, 618 (1992). In the present case, Plaintiffs have alleged sufficient facts which, if true, establish that the accident was a result of Plaintiffs' negligence in constructing the plane. Accordingly, this Court has subject-matter jurisdiction over this action since Defendants are not entitled to immunity under the FSIA.

BASED ON THE FOREGOING, the Court hereby DISMISSES Plaintiffs' Complaint WITHOUT PREJUDICE.

IT IS SO ORDERED.

DATED: 12/1/95 /s/ Consuelo B. Marshall
HONORABLE
CONSUELO B. MARSHALL
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BELINDA POLLACK, et al., Plaintiffs v. AGUSTA S.P.A., et al., Defendants.	CASE NO. 94-7770 CBM (CTx) ORDER RE: (1) MOTION TO DISMISS THIRD AMENDED COMPLAINT; ALTERNATIVE MOTION TO STRIKE JURY DEMANDS; (2) MOTION FOR ORDER CERTIFYING ISSUE FOR INTERLOCUTORY APPEAL (FILED APR 19, 1996)

Before the Court, the Honorable Consuelo B. Marshall, United States District Court Judge, presiding, are two motions: (1) a motion to dismiss the third amended complaint, and (2) a motion to certify an order for interlocutory appeal. Based on the foregoing, the Court hereby GRANTS the motion to dismiss the third amended complaint. In light of this dismissal, the motion to certify the December 10, 1995 order for interlocutory appeal is moot.

This action arises out of a plane crash which occurred on November 26, 1993. Defendant Marchetti is the designer and manufacturer of the engine and other parts of the subject aircraft. Defendant Agusta is the owner, along with another government entity, of Marchetti. Plaintiffs Lyon and Pollack are the representatives of the estates of those who died in the crash. In December 1970, Defendants sold and delivered the subject plane to S.A. Sabena ("Sabena"), the original purchaser. Defendants

claim no involvement with the subject plane after that date.

The General Aviation Revitalization Act of 1994 ("GARA"), which became effective on August 17, 1994, imposes an 18 year statute of repose on civil actions against aircraft manufacturers.[1] Plaintiffs' first and second amended complaints have both been previously dismissed pursuant to the time limitations of GARA.[2] Defendants now move to dismiss the third amended complaint.

In the third amended complaint, Plaintiffs attempt to bring this action within GARA's "component parts" provisions.[3] Generally, this subsection of GARA provides that no civil action for damages arising out of an accident may be brought against the manufacturer of *component parts* that were added to an aircraft if the accident occurred 18 years after the replacement or addition of

---

[1] Sec. 2 of GARA provides for time limitations on civil actions against aircraft manufacturers. Generally, it provides that no civil action may be brought against a general aviation aircraft manufacturer more than eighteen years after the delivery date of the aircraft to its first purchaser. With respect to a new component part added or replaced on the plane, no civil action may be brought against that component's manufacturer more than 18 years after the date of completion of the replacement or addition. 49 U.S.C § 40101.

[2] The first complaint was dismissed in a December 6, 1995 order. The second amended complaint was dismissed in a February 9 1996 order.

[3] The claims regarding the accident aircraft itself (not the component parts) have already been dismissed pursuant to the time limitations of GARA in a December 11, 1995 order.

said component part. 49 U.S.C. § 40101, §2(a)(2). Therefore, in order to properly state a claim under this subsection, Plaintiffs must allege that a replacement or additional component part was placed in the aircraft by the Defendant manufacturers within the 18 years preceding the accident.

In the third amended complaint, Plaintiffs assert a "failure to warn" theory as to two component parts: (1) in 1982, Defendants took action to warn users of Italian planes of the danger posed by the *fuel selector valve*, but failed to warn users of non-Italian aircraft employing the same fuel system with the same dangerous component, and (2) Defendants failed during the 18-year period to advise the users of the aircraft that the *engine mount* must be replaced after replacing the engine. Plaintiffs contend that Defendants' failure to warn was a cause of the accident. Additionally, Plaintiffs allege that during the 18 years preceding the accident Defendants assumed and breached a continuing duty to advise and warn users of these known defects in the aircraft and component parts.

Plaintiffs do not allege that defective parts were added after 1975 (18 years preceding the accident), but that Defendants failed to add component parts to the accident plane and failed to warn certain parties that parts needed to be added within the 18 years preceding the accident. This claim does not fall under the component parts provision of GARA.[4] Because Defendants were

---

[4] If it did, GARA's provisions would be rendered meaningless because plaintiffs could simply plead around its provisions by asserting general claims of negligent maintenance.

not involved with the plane in the 18 years preceding the accident, GARA effectively absolves them of liability.

With regard to Defendants' alternative motion to strike jury demands, this Court finds that Plaintiffs have no right to a jury trial under the Foreign Sovereign Immunities Act ("FSIA"). 28 U.S.C. § 1330. This Court previously determined jurisdiction pursuant to FSIA.[5] (December 11, 1995 Order re: Defendants' Motion to Dismiss). Since Defendants Agusta and Marchetti are owned, in whole or in part, by the Italian government, they qualify as an "agent or instrumentality of a foreign state" pursuant to 28 U.S.C. § 1603(a) of FSIA.[6] No right to a jury trial attaches to claims brought against a foreign state. *Wilmington Trust v. U.S. Dist. Court for D. Hawaii*, 934 F.2d 1026, 1032 (9th Cir. 1991).

---

[5] The Court finds that the "direct effects" exception to the FSIA, 28 U.S.C. § 1605, applies to Defendants. Therefore, this Court retains jurisdiction over Defendants.

[6] 28 U.S.C. § 1603(a) provides that:

> An "agency or instrumentality of a foreign state" means any entity –
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332 and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(a).

BASED ON THE FOREGOING, the Court hereby dismisses the third amended compliant. The motion to certify the December 10, 1995 order for interlocutory appeal is thereby moot. Defendants Agusta, S.P.A. and SIAI Marchetti S.P.A. are dismissed pursuant to this order, Defendant Agusta Aerospace Corporation was dismissed in a stipulation filed April 24, 1995 and the parties agreed at the hearing on this matter that Defendant Sesto Calende Works of Agusta has not been served or is nonexistent. There being no remaining defendants, this case is hereby dismissed.

IT IS SO ORDERED.

DATED: 4/17/96 /s/ Consuelo B. Marshall
CONSUELO B. MARSHALL
UNITED STATES
DISTRICT JUDGE

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KATHY LYON, an individual and as Guardian Ad Litem for AARON J. Lyon; & TARA JEAN LYON; AARON J. LYON, by and through his Guardian Ad Litem Kathy Lyon; TARA JEAN LYON, by and through her Guardian Ad Litem Kathy Lyon; DAVID LYON, by and through its [sic] Personal Representative Kathy Lyon,

Plaintiff-counter-defendant-cross-defendants – Appellants,

v.

AGUSTA S.P.A.; SIAI MARCHETTI CORPORATION; SESTO CALENDE WORKS OF AGUSTA; AGUSTA AEROSPACE CORPORATION,

Defendant-counter-claim-3rd-party-plaintiffs – Appellees,

and

UNITED STATES OF AMERICA,

Intervenor.

No. 99-55986

D.C. No. CV-94-07769-CBM

ORDER DENYING PETITION FOR REHEARING

(Filed Jul. 3, 2001)

KATHY LYON, an individual and as Guardian Ad Litem for AARON JEAN LYON; & TARA JEAN LYON AARON J. LYON, by and through his Guardian Ad Litem Kathy Lyon; DAVID LYON, by and through its Personal Representative Kathy Lyon, Plaintiff-counter-defendant-cross-defendants – Appellants-cross-Appellees, v. AGUSTA S.P.A.; SIAI MARCHETTI CORPORATION; AGUSTA AEROSPACE CORPORATION; SESTO CALENDE WORKS OF AGUSTA, Defendant-counter-claim-3rd-party-plaintiffs – Appellees-cross-Appellants, and UNITED STATES OF AMERICA, Intervenor.	No. 99-55987 D.C. No. CV-94-07769-CBM

BELINDA POLLACK, individually; HANNA MARIE POLLACK, by and through her Guardian Ad Litem, Belinda Pollack; RENEE STEVEN POLLACK, by and through her Guardian Ad Litem, Belinda Pollack; ESTATE OF STEVEN S. POLLACK, by and through its Personal Representative, Belinda Pollack, Plaintiffs – Appellants, v. AGUSTA, S.P.A.; SIAI MARCHETTI CORPORATION, Defendants – Appellees, and UNITED STATES OF AMERICA, Intervenor.	No. 99-56010 D.C. NO. CV-94-07770-CBM
BELINDA POLLACK, individually; HANNA MARIE POLLACK, by and through her Guardian Ad Litem, Belinda Pollack; RENEE STEVEN POLLACK, by and through her Guardian Ad Litem, Belinda Pollack; ESTATE OF STEVEN S. POLLACK, by and through its	No. 99-56011 D.C. No. CV-94-07770-CBM

Personal Representative,
Belinda Pollack,

Plaintiffs – Appellants/Cross-Appellees,

v.

AGUSTA, S.P.A.; SIAI MARCHETTI CORPORATION,

Defendants – Appellees/ Cross-Appellants.

Before: PREGERSON, FERNANDEZ, and GRABER, Circuit Judges.

The panel has unanimously voted to deny the appellants' petition for rehearing.

The petition for rehearing is DENIED.